



2011

INVOLUNTARY SEPARATION ANXIETY: Taking Adverse Actions in Special Situations

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Agenda

- Introduction
- Test your knowledge
- The “BRAC” effect
- Furloughs
- Performance-based Actions

Introduction

- What are we talking about today? – Separations (and other actions) against the will and without the consent of the employee other than for cause on charges of misconduct or delinquency
- Actions considered non-disciplinary BUT adverse action procedures are used to effect
- Authority – 5 USC Chapter 75
 - 5 CFR Part 752
 - 5 USC Chapter 43, 5 CFR Part 432 for performance-based actions

Introduction

- What's so special about these actions? -- I'm still demoted, furloughed or out of a job!
- Doesn't have the stigma of "for cause"
- May have eligibility for certain benefits/relief/entitlements
 - Severance Pay
 - Unemployment Compensation
 - Discontinued Service Retirement (DSR)
 - DoD Priority Placement Program (PPP)

Test Your Knowledge

True or False?

If I turn down a reassignment outside of my commuting area and don't find another job I am automatically entitled to severance pay upon my separation from Federal service.

Test Your Knowledge

True or False?

If I am terminated from my position because lost my security clearance I am likely to be found ineligible for unemployment compensation benefits.

Test Your Knowledge

True or False?

Agencies must provide 30 calendar day notice and an opportunity to respond prior to issuing a decision to furlough in the event of a government shutdown.

Test Your Knowledge

True or False?

Employees removed during their probationary or trial period do not have MSPB appeal rights.

Test Your Knowledge

True or False?

It is easier to remove an employee for poor performance than for travel voucher fraud.

The “BRAC Effect”

- DCMA Case Study: Base Realignment and Closure (BRAC) Act of 2005
 - DCMA HQ, DCMA International, DCMA SP Divisions to relocate from Alexandria, VA to Fort Lee, VA NLT **Sep15, 2011**
 - Phased relocation to Ft Lee Jan 2010 – Aug 2011
 - All current DCMA employees offered opportunity to transfer
 - No RIF as a result of the relocation

The “BRAC Effect”

- “Transfer of Function (TOF)” v. Transfer of Work” (TOW)
 - TOF (5 CFR 351.203) – function ceases in one competitive area and moves to another competitive area not performing the function at the time of the transfer
 - TOW – function is still performed in the same competitive area but moves to a new location outside the commuting area
- DCMA single competitive area – PA, MD, WV, DE, VA, DC
 - Employees received TOW offer

The “BRAC Effect”

- “TOW” letters issued between Mar 2010 and July 2010 to all affected employees
 - 30 days to accept decline offer
 - Declination of offer could result in separation
- Employee declines offer
 - Eligibility for PPP – offer outside commuting area (Priority 2)
 - Regular Retirement
 - DSR
 - Separation under adverse action procedures
 - Resignation
 - No VSIP or VERA

The “BRAC Effect”

- Jan 2011 – 3 employees proposed for separation based upon declination of TOW
 - Decision letters issued Feb 28 w/effective date of March 31
- March 2011 - 1 employee rescinded acceptance of TOW and rec'd proposed separation notice
 - Employee advised of eligibility for DSR

The “BRAC Effect”

- Separation actions
 - Chapter 75/Part 752 procedures utilized
 - Based upon declination of TOW offer
 - Failure to accept reassignment outside commuting area
 - Proposing Official - HC Director
 - Deciding Official - DCMA Deputy Director
 - Not just about MSPB appeal rights
 - Essential to advise employee of all options
 - One size does not fit all
 - In-person issuance of decisions
 - Valued employees
 - Not “for cause”

The “BRAC Effect”

- Severance pay for separated employees
 - Involuntarily separated for reasons other than “inefficiency” (unacceptable performance or misconduct)
 - At least 12 months continuous service
 - Qualifying appointment
 - Career or career conditional appt in competitive service
 - Equivalent in excepted service
 - Regularly scheduled tour of duty

The “BRAC Effect”

- Ineligible for severance pay
 - Serving under a non-qualifying appointment (e.g. Schedule C employee, term appointment, etc.)
 - Declination of a “reasonable offer” of another position
 - In writing, minimum qualifications met, same agency within same commuting area, equal or same tenure w/same work schedule and not lower than 2 grades/pay levels below current position ([5 CFR 550.703](#))
 - Receiving injury compensation under 5 USC Chapter 81, subchapter I
 - Eligible for immediate annuity under CSRS, FERS or from the uniformed services

The “BRAC Effect”

- Unemployment Compensation
 - Involuntary separation not “for cause”
 - Based upon Federal and state laws
 - Eligibility for receipt and period of time benefits paid varies from state to state
 - Severance pay and other benefits may affect entitlement

The “BRAC Effect”

- Employee may qualify for Discontinued Service Retirement (DSR) [5 USC 8336(d); 5 CFR 831.503]
 - If involuntary separations for RIF; Abolishment of position; lack of funds; unacceptable performance; TOF outside commuting area; MDRs outside commuting area where no mobility agreement; Failure to meet qualification requirements for position; separation during probation because of failure to qualify due to performance; removal from SES for less than fully successful performance
 - Final approval of DSR rests with OPM

The “BRAC Effect”

- Employee eligibility for DSR
 - CSRS
 - 50 years old w/20 years of service
 - Any age and 25 years of service
 - Minimum 5 years of creditable civilian service
 - Separated from position covered by retirement deductions
 - Covered by CSRS for at least 1 year within 2 year period immediately preceding the separation
 - No declination of a “reasonable offer.”
 - FERS
 - Same age/service, “reasonable offer” requirements
 - Separation from position subject to FERS coverage

The “BRAC Effect”

- DSR Eligibility – effect of Mobility Agreements
 - If employee has a mobility agreement or PD had mobility requirement, **not eligible for DSR** if declines position outside commuting area
 - If mobility requirement was added to PD after employee accepted position and employee declines reassignment, **employee remains eligible for DSR.**

The “BRAC Effect”

- DSR notice requirements
 - Directed to employee
 - Employee faces involuntary separation
 - Reasons for action
 - Effective date of action
 - For MDR notice of directed reassignment qualifies
- Notice and all supporting documentation must be submitted to OPM for approval

The “BRAC Effect”

- The DoD Priority Placement Program (PPP)
 - Automated referral program matches eligible registrants with job opportunities at DoD activities
 - Career or career conditional employees in the competitive service or exceptive service employees without personal competitive status may register if they are scheduled for **displacement action (e.g. BRAC)**
 - 3 Priority levels based upon severity of action
 - DCMA employees registered as Priority 2 – could opt to register voluntarily when they received their TOW letter
 - Registration mandatory if employee entitled to severance pay and decline TOW outside commuting area

The “BRAC Effect”

- How PPP works (using DCMA employees)
 - Employee declines TOW – registers in
 - Voluntary when TOW notice rec’d
 - Mandatory upon receipt of separation notice (if eligible for severance pay)
 - Employee submits resume w/skills and abilities
 - Gaining agency must clear well-qualified PPP matches before making non PPP selection
 - Employee in PPP until placement or no longer eligible
 - Declination of valid offer
 - Not available for work
 - Can remain on PPP for up to 1 year following separation

The “BRAC Effect”

- Valid Offer under PPP
 - Full-time permanent DoD position
 - Matches series, grade and location registered
 - Registrant is well-qualified
 - Possesses requisite “KSAs” to successfully perform duties of position w/ a reasonable orientation period
 - Pay retention applies if employee accepts a lower grade w/out a break in service
- One valid offer is all you get!
 - Loss of severance pay if you decline???

Furloughs

- Places employee in **temporary nonduty, nonpay status**
 - Lack of funds or work
- Two types
 - “Shutdown” or “Emergency”
 - Lapsed appropriations
 - “Save money”
 - Planned reduction in agency expenditures
- Two categories
 - 30 days or less (5 CFR part 752)
 - 30 days or more (5 CFR part 351)

Furloughs

- Employee procedural rights for furloughs of 30 days or less (5 USC 7513)
 - 30 calendar days written notice w/specific reasons for proposed action
 - If some, not all, employees in competitive level affected must state basis for selecting employee. 5 CFR 752.404 (b)(2)
 - 7 calendar days for employee reply (oral and written)
 - Right to representation
 - Written decision w/ specific reasons for action
 - MSPB appeal rights
 - Agency CBA may have additional rights

Furloughs

- Shutdown or Emergency Furloughs
 - Advance written notice and opportunity to apply not necessary where furlough for “unforeseeable circumstances”
 - Sudden breakdowns in equipment
 - Acts of God
 - Sudden emergencies requiring curtailment of activities
 - Lapsed appropriations
 - Any reasonable notice (telephonic or oral) permitted
 - Employee advised of maximum time involved if unable to provide specific number of days

Furloughs

- Who gets furloughed?
 - Everyone but “excepted employees”
 - Not to be confused with “emergency employees”
- Who has to work?
 - “Excepted employees” (excepted by law)
 - Perform emergency work involving the safety of human life or the protection of property
 - Involved in orderly suspension of agency operations
 - Perform other exempt functions

Furloughs

- Labor obligations
 - Furlough decision—management right 5 USC 7106 (a)(2)(A)
 - Change in working conditions
 - Must bargain procedures (“I &I”) 5 USC 7106(b)(2)
 - Must bargain appropriate arrangements for adversely affected employees 5 USC 7106(b)(3)
 - Consider satisfying bargaining obligation in CBA
 - If “covered by” CBA, no duty to bargain at time of furlough

Furloughs

- Effect on Employee benefits (examples)
 - FEHB continues for 365 days in nonpay status (normal cost to employee) (5 CFR Part 890)
 - FEGLI continues for 12 months w/out cost (5 CFR Part 870)
 - 6 months nonpay service creditable towards retirement
 - 22 nonpay status workdays creditable toward completion of probationary period
 - All paid leave canceled

Furloughs

- Preparing for the shutdown
 - Provide as much information to affected employees as possible (Note: the union can be very helpful here)
 - Have a notification plan – unlikely that there will be time for advance notice (written notices already staffed and ready for distribution, plans for alternative distribution methods)
 - Identification of “excepted employees”
 - Strict adherence to published criteria
 - Potential bargaining obligation

Performance-based Actions

- Authority – Chapter 43, Title 5 USC
 - 5 CFR Part 432
 - Applies to reduction in grade and removal of employees based solely on performance at the unacceptable level
- (Chapter 75 and Part 752 may also be used for performance-based actions)
- NOTE: Employees working during probationary/trial periods are not covered by Parts 432 or 752

Performance-based Actions

- Performance v. Discipline
 - Conduct is usually pass or fail with no gradations, Performance generally has degrees

Fundamental Question

Is the employee not able to do the work or is he/she not willing to do it?

Performance-based Actions

- It is often difficult to tell whether an employee's failure to complete assignments or lackluster performance is the result of misconduct or lack of the skills necessary to fully perform.
- It is not uncommon for discipline issues to grow out of an employee's inability to perform at the fully successful level.

Performance-based Actions

Use Performance – Based Actions when:

- Employee is on a **CURRENT** Performance Plan
- You have identified the problem to be corrected (performance analysis)
- There are no physical, medical or emotional issues preventing fully successful performance
- There are no obstacles preventing fully successful performance

Performance-based Actions

Use Disciplinary Action when:

- Violates written or unwritten rules
- Results from laziness, carelessness, or inattention
- Involves safety and health issues
- Has consequences for failure that are catastrophic
- Results from deliberate failures or refusals
- Requires improvement be immediate, not gradual

Performance-based Actions

Common Causes of Performance Deficiencies

- Lack of Training
- Lack of Feedback
- Organizational Barrier
- Disagreeable Work
- No Consequences
- Wrong Consequences
- Inability

Performance-based actions

- Poor performance – Employee-based causes
 - Lack of ability
 - Lack of effort
 - Lack of attention
 - Lack of basic knowledge
 - Lack of skill
 - Lack of judgment
 - Problems not work-related
 - Substance abuse

Performance-based actions

- Poor Performance – Organization-based causes
 - Lack of communication
 - Lack of performance feedback
 - Failure to provide necessary training or instruction
 - Failure to provide necessary tools or other resources
 - Failure to provide a reasonable accommodation that would allow employee to perform
 - Unrealistic performance expectations
 - Harassment or otherwise hostile work environment

Performance-based Actions

Why the cause matters

It is important to carefully consider the causes of a performance problem before attempting to deal with it.

Different actions are likely to be effective in different situations

Performance-based Actions

Process begins with counseling the employee

- Be explicit, discuss the poor performance
- Give facts, examples
- Make sure employee knows seriousness
- Be specific on expected improvement
- Set time limits
- Ask about medical or other problems that could be adversely affecting performance
- Advise that failure to correct deficiencies will result in adverse consequences
- Document

Performance-based Actions

- Purpose of Performance Improvement Plan (PIP)
 - Gives employee opportunity to demonstrate acceptable performance
 - Required by law (5 U.S.C. 4303)
 - Clarify exact performance expectations
 - Provides employee “fair” opportunity to show he/she can do the job
 - Provides employee opportunity to re-evaluate

Meaningful Opportunity to Improve

Performance-based Actions

- PIP Elements
 - States performance is unacceptable
 - Establishes period to attain Fully Successful level
 - Clearly identifies each critical element deficiency
 - Informs employee of measures to bring performance to Fully Successful level
 - Identifies how performance will be monitored/evaluated
 - Advises employee of assistance that will be provided
 - States consequences if performance not improved (reassignment, demotion or removal)

Performance-based Actions

- Supervisor Responsibilities during PIP
 - Monitor/Sample all work;
 - Periodic counseling on progress;
 - Written record kept on each session - document all mistakes;
 - Give constant feedback;
 - Annual performance rating deferred until end of PIP period

Performance-based Actions

- Results when Fully Successful performance achieved
 - Performance rating and letter stating fully successful
 - Employee must maintain fully successful performance level for 12 months
 - Faces reassignment, demotion or removal after 30 days notice if performance is deficient

Performance-based Actions

- Results when PIP unsuccessful:
 - Performance rating of unacceptable
 - Reassignment;
 - Letter of Proposed Demotion; or
 - Letter of Proposed Removal
 - List instance(s) of unacceptable performance
 - Must directly relate to requirement in PIP

Note: Must withhold WIGI while on PIP

Performance-based Actions

- Demotions and Removals appealable to MSPB
 - MSPB can only uphold action taken, cannot mitigate;
 - Will not substitute supervisors judgment on level/quantity/quality;
 - Substantial evidence standard for Chapter 43 actions

Performance-based Actions

Handling both a Performance and Disciplinary Problem

- Separate Performance from Conduct
 - Handle as a disciplinary matter any performance problem that is deliberate or negligent.
- Look for the Cause of the Problem
- Focus Employee's Attention on the Problem
- Take a Performance - Based Action
 - Performance Improvement Plan (PIP)

Performance-based Actions

Using Discipline for Performance Problems

- Professionalism;
- Safety or Security;
- Single instances of Incompetence;
- Deliberate Acts or Refusals to Follow Instructions/Policies;
- Acts Caused by Carelessness, Inattention, or Laziness;
- Performance Matters not Addressed in Standards

Performance-based Actions

Examples of charges:

- Failure to follow instructions;
- Failure to complete a work assignment in a timely fashion;
- Failure to meet assigned suspense dates;
- Violation of Agency policy/Failure to follow established policy;
- Careless workmanship;
- Failure to follow proper procedures.

Performance-based Actions

- Medical Inability to Perform – Employee's inability to carry out functions of job because of disabling physical or mental impairment
 - Agency may remove employee if unable to perform duties of position due to medical condition
 - ***Edwards v. Department of Transportation***, 108 LRP, 109 MSPR 579 (MSPB 2008)
 - Removal for physical inability to perform duties promotes efficiency of service

Performance-based Actions

- Using discipline for performance problems
 - Will be adverse action using Chapter 75, Part 752 procedures
 - Preponderance of the evidence standard
 - Unacceptable performance rating not required for Chapter 75 removal
 - No PIP, but MSPB will consider mitigating factors
 - Length of service
 - Record of past satisfactory service
 - Deficiencies leading to action being taken

Miscellaneous

- Separation during probationary or trial period
 - 1 year probationary period competitive service
 - 1 or 2 year trial period excepted service
 - Can be for conduct (for cause) or performance
 - Employee receives written notice stating reasons for separation and effective date
 - Limited MSPB appeal rights
 - Discrimination based on marital status
 - Discrimination based on partisan political status

NOTE: Watch timing of these actions – must ensure action takes place prior to end of the probationary period

